## OPINION 65-22

**Syllabus:**

1. Water lines and sanitary sewer lines cannot be considered as a part of an easement for highway purposes and such lines cannot be placed within a highway right-of-way without a separate easement from the owners of the fee.

2. Storm sewer lines which drain only the highway surface and its right-of-way do not constitute an additional burden upon real property subject to an easement for highway purposes and may be constructed within the highway right-of-way as a part of such an easement.

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**To: Edwin T. Hofstetter, Geauga County Pros. Atty., Chardon, Ohio**
**By: William B. Saxbe, Attorney General, February 8, 1965**

Your request for my opinion reads in pertinent part as follows:

> "* * * * * * * * *
> * * *.
>
> "Geauga County has been an extremely rural county until recently. We anticipate the construction or installation of sewer and water lines within the road right-of-way in many areas of the county. The vast majority of the property owned in this county is owned to the road centerline, subject to easement for road purposes.
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> "The Engineer's office and the Sanitary Engineer's office now request your opinion as to whether it is necessary to obtain easements from all the property owners for water and sewer lines where their property lines extend to the centerline of the road and easements presently exist only for highway purposes, or, as is commonly noted in most of the deeds in the county, 'subject to all legal highways.'"

As a preliminary matter to this opinion, please note that in conformity with your request I am limiting my discussion to the situation in which title to land under a road remains with the abutting owner to the centerline, subject to easements only for highway purposes.

With regard to water lines and sanitary sewer lines, the law in Ohio is now well-settled that such items, when located in the right-of-way of roads outside municipalities, constitute additional burdens upon the fee which are not within the scope of an easement for highway purposes. As such, the owner of the fee is entitled to compensation for this additional use of the right-of-way.

With regard to water lines, the law in Ohio is expressed best by the case of Hofius v. The Carnegie-Illinois Steel Corp., 146 Ohio St., 574. The language of the syllabus is clear. It reads, in pertinent part, as follows:

> "The construction of a water main in a highway outside a municipality by a village for the benefit of domestic and industrial water users of the village constitutes an additional burden upon the fee of the abutting owner * * *."

There have been no cases in Ohio on this question involving sanitary sewers instead of water pipes. However, as the following language in the Hofius case, supra, indicates, the conclusion reached would be the same. At pages 580-581 of the opinion, the Court says in part:

> "Appellees argue that a distinction is to be made between erections above ground such as poles and wires and those made below the surface. We see no distinction as there is an additional burden placed upon the land in both cases. * * *
>
> "Appellees further argue that a distinction is to be made between such use as herein involved by a public authority such as the village and a privately owned public utility. If we keep in mind that it is the property right of the landowner which is being invaded in both instances and that such right is protected against public confiscation by Section 19 of Article 1 of the Constitution, it must be realized that there is no distinction in principle. * * *"
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> (Emphasis added)

The above language indicates to me that the particular kind of burden, i.e., whether it be water line, sanitary sewer line, gas line, or whatever, is irrelevant; that all that matters is whether there is in fact a burden. The test, of course, whether there is an additional burden is whether some use is being made of the land which is not within the scope of an easement for highway purposes, as indicated by the syllabus quoted supra.

The above principles were reaffirmed quite recently in the case of Friedman Transfer & Construction Co. v. Youngstown, 176 Ohio St., 209, 212 (1964).

The court there said in part:

> "The Hofius case held that water mains in a highway outside a municipality constructed for the benefit of domestic and industrial users of the village constitute an additional burden upon the fee of the abutting-land owner.

> "* * * The weight of authority makes a distinction between the character of the title of the municipality to its public streets and the character of the title to public highways outside municipalities. The city owns the fee to its streets in trust for street purposes; outside of municipalities, abutting-property owners own the fee to the highway, subject to the easement of the public to use the highway for purposes of travel.
>
> "The opinion in the Hofius case recognizes this principle * * *"

Where a storm sewer is located under the right-of-way solely to receive surface runoff and otherwise drain the right-of-way, the law is not so clear. An early case held that such a sewer could not be interfered with by an adjacent property owner. Paragraph one of the syllabus of Whitney v. Toledo, 8 C.C. (N.S.), 577 (1906), reads as follows:

> "The use of a public road for the purpose of carrying a sewer beyond the limits of a municipality to a suitable point for discharging its contents into a water course cannot be interfered with by an adjacent property owner, where the use of the sewer is restricted to surface or storm water, and its construction has been duly authorized by the city council with the approval of the state board of health and the county commissioners."

This has been the only judicial utterance pertaining to storm sewers in the right-of-way of a road. A moment's reflection, however, will reveal the soundness of this holding. First, a storm sewer for drainage of a road and its right-of-way, is, in a sense, a part of the road itself. The storm sewer is a necessary adjunct to a road in many cases. Often, perhaps in most cases, such a sewer is installed at the same time the road itself is built. Such a sewer, in short, has a connection with the road and right-of-way that no other type of pipeline, wires, etc. possesses. It should, therefore, not be classified as an additional burden upon an abutting property owner for which added compensation must be paid. It must be added, though, that if sanitary sewer lines were later tapped into such a storm sewer, it would lose its unique status and become an additional burden.

Accordingly, it is my opinion and you are hereby advised that:

1. Water lines and sanitary sewer lines cannot be considered as a part of an easement for highway purposes and such lines cannot be placed within a highway right-of-way without a separate easement from the owners of the fee.

2. Storm sewer lines which drain only the highway surface and its right-of-way do not constitute an additional burden upon real property subject to an easement for highway purposes and may be constructed within the highway right-of-way as a part of such an easement.